

February 4, 1999



OFFICE OF THE  
ATTORNEY GENERAL  
STATE OF TEXAS

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Mr. Lou Bright  
General Counsel  
Texas Alcoholic Beverage Commission  
P.O. Box 13127  
Austin, Texas 78711-3127

OR99-0322

Dear Mr. Bright:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 121551.

The Texas Alcoholic Beverage Commission (the "commission") received a request for "all personal material" of a named individual. You indicate that many of the responsive records have already been released to the requestor. However, you assert that some of the records at issue are excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. You also contend that some of the information is confidential under section 552.101 of the Government Code in conjunction with provisions of the Family Code, the Alcoholic Beverage Code, and chapter 411 of the Government Code. You submitted to this office for review various documents labeled as Attachments C through F.

You indicate that some of the records you submitted to this office are not part of the named individual's personnel file and that you do not believe these records are responsive to the request. The commission has an obligation to make a good faith effort to locate requested records. Open Records Decision No. 561 at 8 (1990). If you are unclear as to what documents the requestor seeks, you can ask the requestor to clarify his request so that the commission can locate the records. Gov't Code §552.222. However, you are not obligated to provide records to the requestor which are not responsive to the request. Assuming that the submitted records are actually responsive, we will address each submitted packet of records, labeled as Attachments C through F.

**Attachment C** - You assert that pages 1 through 16 of Attachment C are criminal history records that are made confidential under section 552.101 of the Government

Code, in conjunction with section 411.106 of the Government Code and also section 109.532 of the Alcoholic Beverage Code. You contend that pages 17 through 45 of Attachment C are records made confidential under section 552.101 of the Government Code in conjunction with section 5.48 of the Alcoholic Beverage Code. Section 552.101 provides an exception to disclosure for records that are confidential by law.

Section 411.091(a)(1) of the Government Code entitles the commission to obtain, from the Department of Public Safety, criminal history record information ("CHRI") that "the commission believes is necessary for the enforcement or administration of the Alcoholic Beverage Code." Section 411.091(b) restricts use of information so obtained to "the enforcement and administration of the Alcoholic Beverage Code." Section 109.532 of the Alcoholic Beverage Code provides for the commission to conduct criminal history information background checks, but also provides that this information is confidential:

(c) All criminal history information received by the commission is privileged information and is for the exclusive use of the commission. The information may be released or otherwise disclosed to any other person or agency only:

(1) on court order; or

(2) with the consent of the person being investigated. .

(d) The commission shall collect and destroy criminal history information relating to a person immediately after the commission makes a decision on the eligibility of the person for registration.

(e) A person commits an offense if the person releases or discloses in violation of this section criminal history information received by the commission. An offense under this subsection is a felony of the second degree.

Based upon our review of the records and your arguments, we agree that pages 1 through 16 of Attachment C are confidential criminal history information records which may not be released to the requestor.

Section 5.48 of the Alcoholic Beverage Code provides that certain records held by the commission are private and may not be released to the public:

(a) "Private records," as used in this section, means all records of a permittee, licensee, or other person other than the name, proposed location, and type of permit or license sought in an application for an

original or renewal permit or license, or in a periodic report relating to the importation, distribution, or sale of alcoholic beverages required by the commission to be regularly filed by a permittee or license.

(b) The private records of a permittee, licensee, or other person that are required or obtained by the commission or its agents, in connection with an investigation or otherwise, are privileged unless introduced in evidence in a hearing before the commission or before a court in this state or the United States.

You also rely upon this office's ruling in Open Records Letter No. 96-0771 (1996) to show that pages 17 through 45 are confidential. In that informal ruling to your agency, we agreed that if the commission has released responsive information reflecting the name of the licensee or permit holder, the type of license or permit held, the address or proposed location of the premises, and also any responsive information made public under section 5.47, the licensee or permittee's applications and related documents are confidential.<sup>1</sup> Based upon our understanding that the documents at issue are maintained either as applications, renewals, periodic reports, or related documents, and that you have released information reflecting the name of the licensee or permit holder, the type of license or permit held, the address of the premises and information made public under section 5.47, we agree that pages 17 through 45 of Attachment C are confidential under section 5.48.

**Attachment D** - You contend that certain highlighted information in Attachment D is confidential under section 58.007 of the Family Code, which reads in pertinent part as follows:

Except as provided by Subsection (d), law enforcement records and files concerning a child may not be disclosed to the public . . . .

*See also* Fam. Code § 51.02(2) (defining "child"). We have reviewed the reports submitted and conclude that these records are not the type of records which are protected under section 58.007.<sup>2</sup>

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<sup>1</sup>Section 5.47 of the Alcoholic Beverage Code provides that certain records are public and may not be withheld from disclosure:

Records of all violations of this code by permittees and licensees, records introduced and made public at hearings, and decisions resulting from the hearings relating to the violations shall be kept on file at the office of the commission in the city of Austin. The records are open to the public.

<sup>2</sup>We note that if section 58.007 were applicable to these records, they would be closed in their entirety.

Your brief also cites Open Records Letter No. 96-0615 (1996). In Open Records Letter No. 96-0615, this office agreed that section 552.101 of the Government Code protected the identity of an individual working undercover with the commission, on the basis of the informer's privilege. You explain that the individuals whose identities you seek to redact are minors who worked with the commission in an undercover capacity during its investigations. Texas courts have recognized the informer's privilege, *see Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928), and it is a well-established exception under the Open Records Act. Open Records Decision No. 549 at 4 (1990). For information to come under the protection of the informer's privilege, the information must relate to a violation of a civil or criminal statute. *See Roviato v. United States*, 353 U.S. 53 (1957); Open Records Decision Nos. 515 at 2-5 (1988), 391 (1983). We agree that the highlighted information in Attachment D may be withheld from disclosure under the informer's privilege as protected by section 552.101 of the Government Code.

**Attachment E** - You assert that Attachment E is excepted from disclosure under sections 552.107(1) and 552.111 of the Government Code.<sup>3</sup> Section 552.107(1) excepts from disclosure communications that reveal client confidences or the attorney's legal opinion or advice. Open Records Decision Nos. 589 at 1 (1991), 574 at 3 (1990), 462 at 9-11 (1987). Section 552.107(1) does not except from disclosure factual recounting of events or the documentation of calls made, meetings attended, and memoranda sent. Open Records Decision No. 574 at 5 (1990). We have reviewed Attachment E and agree that it may be withheld from disclosure under section 552.107(1). As this information may be withheld from disclosure under section 552.107(1), we need not address your section 552.111 argument against disclosure.

**Attachment F** - You assert that the documents in Attachment F are protected from disclosure under sections 552.103(a), 552.107(1) and 552.111 of the Government Code. To show that section 552.103(a) is applicable, a governmental entity must show that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to the litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The information you have provided shows that there are pending complaints with the Equal Employment Opportunity Commission ("EEOC") against the commission, alleging discrimination on the basis of national origin, race, and age. This office has stated that a pending EEOC complaint

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<sup>3</sup>You are concerned that Attachment E may not be within the scope of the request for records. Please note that we are ruling upon this document only because you submitted the information to this office as responsive to the request and asked us to determine the applicability of exceptions to disclosure for this document.

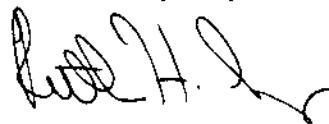
indicates litigation is reasonably anticipated and therefore meets the first prong of the section 552.103(a) test. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

We have reviewed the documents at issue. While we agree that the documents in Attachment F are related to the anticipated litigation, we note that once information has been obtained by all parties to the litigation, no section 552.103(a) interest generally exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). A number of these documents have been seen by the individual who filed the complaints, including the complaints themselves and the mediation information. Also, we assume that this individual has had access to pages 15 through 25 of Attachment F. Please note that information which has been seen by the opposing party in the anticipated litigation also would not be within the scope of the attorney-client privilege as protected under section 552.107(1) or section 552.111.

You may withhold the documents in Exhibit F that the opposing party has not had access to. Please note that the applicability of section 552.103(a) ends once the litigation concludes. Attorney General Opinion MW-575 (1982), Open Records Decision No. 350 (1982).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read 'Ruth H. Soucy', with a stylized flourish at the end.

Ruth H. Soucy  
Assistant Attorney General  
Open Records Division

RHS/ch

Ref: ID# 121551

Enclosures: Submitted documents

cc: Mr. A. L. Martinez